



4510-29-P

**DEPARTMENT OF LABOR**

Employee Benefits Security Administration

Proposed Exemptions from Certain Prohibited Transaction

Restrictions

**AGENCY:** Employee Benefits Security Administration, Labor

**ACTION:** Notice of Proposed Exemptions.

**SUMMARY:** This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following proposed exemptions: **D-11813, The Michael T. Sewell, M.D., P.S.C. Profit Sharing Plan (the Plan); D-11822, Plumbers' Pension Fund, Local 130, U.A. (the Plan or the Applicant); D-11858, Liberty Media 401(k) Savings Plan (the Plan); and, D-11866, Baxter International Inc. (Baxter or the Applicant).**

**DATES:** All interested persons are invited to submit written comments or requests for a hearing on the pending exemptions, unless otherwise stated in the Notice of Proposed Exemption,

within 45 days from the date of publication of this Federal Register Notice.

**ADDRESSES:** Comments and requests for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. All written comments and requests for a hearing (at least three copies) should be sent to the Employee Benefits Security Administration (EBSA), Office of Exemption Determinations, Room N-5700, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. \_\_\_\_\_, stated in each Notice of Proposed Exemption. Interested persons are also invited to submit comments and/or hearing requests to EBSA via e-mail or FAX. Any such comments or requests should be sent either by e-mail to: [moffitt.betty@dol.gov](mailto:moffitt.betty@dol.gov), or by FAX to (202) 219-0204 by the end of the scheduled comment period. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of the Employee Benefits Security Administration, U.S. Department of

Labor, Room N-1515, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

**WARNING:** All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

**SUPPLEMENTARY INFORMATION:**

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27,

2011)).<sup>1</sup> Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

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<sup>1</sup> The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990).

**The Michael T. Sewell, M.D., P.S.C. Profit Sharing Plan**

**(the Plan)**

**Located in Bardstown, Kentucky**

**[Application No. D-11813]**

PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).

If the exemption is granted, the restrictions of section 406(a)(1)(A) and (D) and section 406(b)(1) and (b)(2) of the Act and the sanctions resulting from the application of section 4975, by reason of section 4975(c)(1)(A), (D) and (E) of the Code,<sup>2</sup> shall not apply to the cash sale (the Sale) by the individually-directed account (the Account) in the Plan of Michael T. Sewell, M.D. (Dr. Sewell or the Applicant) of a parcel of unimproved real property (the Property), to Dr. Sewell, a party in interest with respect to the Plan; provided that:

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<sup>2</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

(a) The Sale is a one-time transaction for cash;

(b) The sales price for the Property is the greater of: \$916,501; or the sum of the fair market value of the Property, as established by a qualified independent appraiser (the Appraiser), and the fair market value of timber on the Property, as determined by a qualified independent timber appraiser (the Forester), in separate, updated appraisal reports (the Appraisal Reports) on the date of the Sale;

(c) The Account pays no real estate fees or commissions in connection with the Sale;

(d) The terms of the Sale are no less favorable to the Account than the terms the Account would receive under similar circumstances in an arm's length transaction with an unrelated party; and

(e) Michael T. Sewell, M.D., P.S.C. (the Employer) bears 100% of the costs of obtaining this exemption, if granted.

### SUMMARY OF FACTS AND REPRESENTATIONS<sup>3</sup>

1. The Employer is an orthopedic medical practice that was formed by Dr. Sewell under Kentucky law on December 23, 1990.

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<sup>3</sup> The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

The Employer is located at 875 Pennsylvania Avenue in Bardstown, Kentucky.

2. The Plan is a defined contribution plan that allows participants to self-direct the investments of their individual accounts. Dr. Sewell is a 65 year old participant in the Plan and he is also the Plan trustee. As of June 17, 2015, Dr. Sewell's Account in the Plan had total assets of approximately \$916,501. Nearly all of the Account's assets is comprised of Property described herein.

3. In addressing the Account's lack of diversification, the Applicant represents that in November 2012, Dr. Sewell completed a partial distribution of his Account by rolling over \$704,599.09 to an individual retirement account (the IRA). At that time, the Account still contained an illiquid investment in a real estate investment trust (REIT), in addition to the subject Property. Subsequently, the REIT was liquidated, and proceeds of \$17,011.20 were rolled over into the IRA.

Prior to the rollover, the Applicant represents that Dr. Sewell's Account was diversified. Over time, due to the substantial increase in the value of the Property and the timber situated thereon, Dr. Sewell's Account became heavily concentrated in the Property.

4. On February 27, 1996, the Account purchased the Property, consisting of 277.15 acres of rural farmland, from Mr. Edgar M. Deats and Mrs. Frances E. Deats, who are unrelated parties, for a total cash purchase price of \$279,997.80, that includes \$4,997.80 in closing expenses. The Property, is located on Deatsville Road in Coxs Creek, Kentucky, and is legally described as "DB 327 PG 678 PC 2 SLOT 265 Nelson Co." The Property was purchased by Dr. Sewell's Account for capital appreciation and it adjoins a farm that is owned by Dr. Sewell. Approximately 19% of the Property is grassland and 81% timberland.

5. Since the time of acquisition by the Account, the Property has not been used by or leased to anyone. Aside from the Property's total acquisition price of \$279,997.80, the Account has paid property taxes totaling \$9,093.66 (or approximately \$454 per year); appraisal fees of \$5,950; \$802.11 for liability insurance; and \$4,207.50 for legal and related fees. Thus, the aggregate cost of acquiring and holding the Property by the Account was \$300,051.07 (\$279,997.80 + \$20,053.27), as of November 10, 2015.

6. The Applicant is requesting an individual exemption from the Department to allow Dr. Sewell to purchase the Property from his Account. In this regard, the Applicant states that: (a)



it would be difficult for Dr. Sewell to make distributions from his Account upon reaching age 70½ if the Account continues to hold the Property; (b) if Dr. Sewell decides to terminate the Plan, the tax laws would not permit the rollover of the Property into an individual retirement account; and (c) the value of the grassland portion of the Property, some of which could be used to grow corn, soybeans, and wheat, has stagnated.

The proposed Sale will be a one-time transaction for cash, for the greater of: \$916,501; or the sum of the fair market value of the Property, as established by the Appraiser, and the fair market value of the merchantable timber located on the Property, as determined by the Forester, in separate, updated Appraisal Reports on the date of the Sale. In addition, the terms of the proposed Sale will be at least as favorable to the Account as those obtainable in an arm's length transaction with an unrelated party. Further, the Account will pay no real estate commission, costs, or other expenses in connection with the proposed Sale, and the Employer will pay 100% of the costs of obtaining this exemption, if granted. Finally, the Sale will not be part of an agreement, arrangement or understanding designed to benefit Dr. Sewell or the Employer.

7. Section 406(a)(1)(A) and (D) of the Act states that a fiduciary with respect to a plan shall not cause a plan to engage

in a transaction if he knows or should know that such transaction constitutes a direct or indirect sale or exchange of any property between the Plan and a party in interest, or a transfer to, or use by or for the benefit of, a party in interest, of any assets of the Plan is also a prohibited transaction. The term party in interest is defined by section 3(14) of the Act to include any fiduciary. Dr. Sewell is a party in interest under section 3(14) (A) of the Act as a fiduciary with respect to the Plan because he is the Plan trustee. Therefore, the Sale of the Property by the Account to Dr. Sewell would violate section 406(a) (1) (A) and (D) of the Act.

In addition, section 406(b) (1) of the Act prohibits a plan fiduciary from dealing with the assets of the plan in his own interest or for his own account. Moreover, section 406(b) (2) of the Act prohibits a plan fiduciary, in his individual or in any other capacity, from acting in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.

The sale represents a violation of section 406(b) (1) of the Act since Dr. Sewell would be causing his Account to sell the Property to himself. In addition, the sale represents a

violation of section 406(b)(2) of the Act since Dr. Sewell would be acting on both sides of the transaction.

8. Mr. Roger F. Leggett of Bardstown, Kentucky, has been appointed by Dr. Sewell to serve as the Appraiser and, in such capacity, to prepare the Appraisal Report of the Property. The Appraiser, a Certified General Appraiser, has been licensed in the State of Kentucky since 1994. The Appraiser represents that he has performed appraisal work in Kentucky for more than 45 years, of which he spent more than 25 years working for the U.S. Department of Agriculture where he completed in-house appraisals of farms, rural residences and chattels. The Appraiser states that the gross revenues he received from parties in interest with respect to the Plan, including the preparation of the Appraisal Report, represented approximately 1.8% of his actual gross revenues in 2014.

9. In an Appraisal Report dated October 22, 2014, the Appraiser describes the Property as a 277.15 acre tract of rural farmland with a barn situated thereon, located in the northwest section of Nelson County, Kentucky. The Appraiser notes that the Property has level to moderately sloping terrain, consisting of grassland and woodland, with little marketable timber.

The Appraiser has used the Sales Comparison Approach to value the Property. The Appraiser states that he could not use

the Income Approach to valuation because there are no crops or income produced by the Property. The Appraiser also explains that the Cost Approach could not be used to value the Property because there are no improvements to the site.

The Appraiser represents that the Sales Comparison Approach is the most reliable because there were real estate sales available for comparison. In this regard, the Appraiser states that he reviewed public records, Multiple Listing Service data, and obtained information from other real estate agents and land owners. Based on the Sales Comparison Approach, the Appraiser has placed the fair market value of the Property at \$831,450, as of October 22, 2014.

The Appraiser is also of the view that the Property does not have any assemblage value. The Appraiser explains that assemblage value is where an adjoining property is purchased to enhance the value of the present property. According to the Appraiser, this factor works mainly in commercial or industrial property where one may need to adjoin land for a parking lot or to be able to make the building larger. The Appraiser represents that it has been his experience that assemblage value is not typically the case with farmland because, generally, as a tract of farmland increases in size, the per acre value decreases. The Appraiser also states that this has been demonstrated repeatedly

in local auctions, where land almost always sells for more per acre in smaller tracts, as opposed to larger tracts, and there usually are more buyers for smaller tracts than for larger tracts.

In an addendum to the Appraisal Report dated November 11, 2015, the Appraiser states that fair market value of the Property has not changed since the 2014 valuation.

10. Mr. Steve Gray of Radcliff, Kentucky has been retained by Dr. Sewell, on behalf of the Account, to prepare a report of the estimated value of the timber that is located on the Property because the Appraiser disclaimed having knowledge of timber values. The Forester is a Certified Natural Resource Conservation Service-Technical Service Provider, and is licensed in the State of Kentucky. The Forester, who is a member of the Association of Consulting Foresters and the Society of American Foresters, represents that he has over thirty years' experience as a Service Forester and Forestry Supervisor with the Kentucky Division of Forestry. The Forester further represents that he has no pre-existing relationship with Dr. Sewell.

The Forester represents that he conducted a forest inventory of the Property on September 22, 2015, using "78 ten factor prism plots" systematically placed throughout the forested parts of the Property. At each plot location, the Forester

explains that trees 12 inches in diameter at breast height (dbh) were recorded by species, dbh, and merchantable height. The Forester also represents that plot data indicated an average of 33 merchantable trees per acre, yielding an average volume per acre of 3,316 board feet (bd. ft.) The Forester further explains that 232 acres of the Property would be classified as forest, which when considering the 3,616 bd. ft. per acre, would yield a total estimated value of 739,480 bd. ft.

The Forester notes that the Property lies in an area with little forest industry. The Forester explains that harvested forest products must be transported at least 50 miles to saw mills that offer competitive prices for these products. The Forester states that transportation distance not only affects the value of the standing timber, but also the amount of timber per acre required to make a timber harvest economically feasible.

The Forester represents that based on his experience, approximately 1,700 bd. ft. per acre is required to make a timber harvest economically feasible in the area of the Property. Moreover, the Forester explains, comparable properties in the area would likely have up to 1,700 bd. ft. per acre without any additional timber value being considered in the Property sale. Subtracting 1,700 bd. ft. per acre from the average of 3,316 bd. ft. per acre on the Property, the Forester states that this

leaves 1,616 bd. ft. to be considered as additional value that is above the valuation in the Property Appraisal Report.

According to the Forester, the Property contains 232 acres of forest with an estimated 1,616 bd. ft. acre, for a total volume of 374,912 bd. ft. The Forester explains that the total volume was apportioned to various species of trees, resulting in a fair market value for the timber of \$85,051 as of October 3, 2015.

Thus, based on the \$831,450 fair market value of the Property, as determined by the Appraiser, and the \$85,051 fair market value of the timber, as determined by the Forester, the aggregate fair market value of the Property is \$916,501. Both the Appraiser and the Forester will update their respective Appraisal Reports on the date of the Sale.

11. The Applicant represents that the proposed transaction is administratively feasible because the Sale will be a one-time transaction for cash. The Applicant also represents that the proposed transaction is in the interest of the Account because the Sale will not cause the Account to incur any expenses, real estate commissions, or other fees. Further, the Applicant explains that the Sale will yield a profit to the Account that is attributable to the Property's appreciation.

In addition, the Applicant represents that the proposed

transaction is protective of the rights of Dr. Sewell, as a Plan participant, because the Sale will allow him to reinvest the proceeds from the Sale in other investments that are more liquid and have a greater chance of capital appreciation, without recurring expenses.

The Applicant also represents that if the proposed exemption is not granted, the Account will experience a hardship or economic loss because Dr. Sewell is approaching retirement age, and his Account will not be able to satisfy the Internal Revenue Service's required minimum distribution requirements due to the lack of divisibility of the Property. Finally, the Applicant represents that the Sale is not part of an agreement, arrangement or understanding designed to benefit Dr. Sewell.

12. In summary, the Applicant represents that the proposed transaction will satisfy the statutory criteria for an exemption as set forth in section 408(a) of the Act for the following reasons:

- (a) The Sale will be a one-time transaction for cash;
- (b) The sales price for the Property will be the greater of: \$916,501; or the sum of the fair market value of the Property, as established by the Appraiser, and the fair market value of the timber, as determined by the Forester, in separate, updated Appraisal Reports on the date of the Sale;



(c) The Account will pay no real estate fees or commissions in connection with the Sale;

(d) The terms of the Sale will be no less favorable to the Account than the terms the Account would receive under similar circumstances in an arm's length transaction with an unrelated party; and

(e) The Employer will bear 100% of the costs of obtaining this exemption, if granted.

#### NOTICE TO INTERESTED PERSONS

Because Dr. Sewell is the sole person in the Plan whose Account is affected by the proposed transaction, it has been determined that there is no need to distribute the notice of proposed exemption (the Notice) to interested persons.

Therefore, comments and requests for a hearing are due thirty (30) days after publication of the Notice in the Federal Register.

All comments will be made available to the public.

**Warning:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Mrs. Blessed Chuksorji-Keefe of the Department, telephone (202) 693-8567. (This is not a toll-free number.)

**Plumbers' Pension Fund, Local 130, U.A.**

**(the Plan, or the Applicant)**

**Located in Chicago, IL**

**[Application No. D-11822]**

#### PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code, and in accordance with the procedures set forth in 29 CFR Part 2570, subpart B (76 FR 46637, 66644, October 27, 2011).<sup>4</sup> If the exemption is granted, the restrictions of sections 406(a)(1)(A) and 406(a)(1)(D) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A) and (D) of the Code, shall not apply to the sale (the Sale) of two commercial buildings (the Properties), by the Plan to the Plumbers' Pension

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<sup>4</sup> For purposes of this proposed exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Fund, Local 130, U.A. (the Union), a party in interest with respect to the Plan, provided that the following conditions are satisfied:

(a) The Sale is a one-time transaction for cash;

(b) The price paid by the Union to the Plan is equal to the greater of: (1) \$1,640,000, or (2) the fair market value of the Properties, as determined by a qualified independent appraiser (the Independent Appraiser) as of the date of the Sale;

(c) The Plan does not pay any appraisal fees, real estate fees, commissions, costs or other expenses in connection with the Sale;

(d) The Plan trustees appointed by the Union (the Union Trustees) recuse themselves from: (1) discussions and voting with respect to the Plan's decision to enter into the Sale; and (2) all aspects of the selection and engagement of the Independent Appraiser for the purposes of determining the fair market value of the Properties on the date of the Sale;

(e) The Plan trustees appointed by the employer associations (the Employer Trustees), who have no interest in the Sale: (1) determine, among other things, whether it is in the interest of the Plan to proceed with the Sale; (2) review and approve the methodology used by the Independent Appraiser in the independent appraisal report (the Appraisal Report) that is being relied

upon; and (3) ensure that such methodology is applied by the Independent Appraiser in determining the fair market value of the Properties on the date of the Sale; and

(f) The Sale is not part of an agreement, arrangement, or understanding designed to benefit the Union.

## SUMMARY OF FACTS AND REPRESENTATIONS<sup>5</sup>

1. **The Plan.** The Plan is a multi-employer defined benefit plan which was established on June 1, 1953, pursuant to a collective bargaining agreement between various contractor associations (the Employer Associations) and the Union (the CBA).

Pursuant to the CBA, the Employer Associations are required to make monthly contributions to the Plan on behalf of their members at a specified amount based upon hours worked. As of September 30, 2015, the Plan covered 9,169 participants and held \$931,622,990 in total assets.

The Plan is administered by a ten member Board of Trustees (the Trustees), consisting of five Employer Trustees and five Union Trustees. The Trustees have ultimate fiduciary, operational, and investment discretion over the Plan's assets, and have entered into an agreement for The Northern Trust Company to

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<sup>5</sup> The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

act as Master Trustee and Custodian for the Plan.

2. **The Properties.** Included among the assets of the Plan are the Properties, which are located at 1330-1332 and 1336 West Washington Boulevard, Chicago, Illinois. The Properties were originally purchased by the Plan on November 30, 2000, from an unrelated party for a total purchase price of \$1,365,000. The Plan did not finance the purchase of either Property and neither is currently encumbered by a mortgage.

The building located at 1330-1332 West Washington Boulevard (the 1330-1332 Building) was constructed in 1939 and consists of a single warehouse and industrial space that covers 9,600 square feet. As represented by the Applicant, the 1330-1332 Building is specifically suited to accommodate printing operations and, as constructed, is unsuitable for use as an office space. Since its acquisition by the Plan, the 1330-1332 Building has not been leased to, or used by, a party in interest to the Plan. The 1330-1332 Building, which is currently vacant, was formerly leased by the Plan to an unrelated party. The Building located at 1336 West Washington Boulevard (the 1336 Building) was constructed in 1926 and consists of 6,500 square feet of office and storage space.

3. **Lease of the 1336 Building.** Effective October 1, 2002, the Trustees entered into an agreement to lease office space in

the 1336 Building to the Union for a term of eight years (the 1336 Building Lease). Pursuant to its terms, the 1336 Building Lease requires the Union to pay to the Plan an annual base rental amount of \$51,620, payable in equal monthly installments of \$4,301.67. As represented by the Applicant, and as reflected in the relevant Trustee meeting minutes, the Union Trustees recused themselves from the decision-making process regarding the 1336 Building Lease.

Since the initial execution, the Plan and Union have agreed to two amendments to the 1336 Building Lease. First, on December 11, 2002, the Plan and Union executed an amendment to provide for semi-annual rent adjustments based upon the Consumer Price Index (CPI). Second, on October 1, 2010, the Plan and Union executed a Lease Modification and Extension Agreement (the 1336 Building Lease Extension) which: (a) extended the term of the 1336 Building Lease for an additional 8 years, expiring September 30, 2018; and (b) raised the base monthly rent amount to \$5,192, with provisions for future CPI adjustments to the rent. As documented in the relevant Trustee meeting minutes, the Union Trustees recused themselves from the decision-making process regarding the 1336 Building Lease Extension. Current monthly rent under the 1336 Building Lease is \$5,492.

With respect to the 1336 Building Lease, the Applicant is

relying upon Prohibited Transaction Exemption (PTE) 76-1 (41 FR 12740, March 26, 1976, as corrected by 41 FR 16620, April 20, 1976), and PTE 77-10 (42 FR 33918, July 1, 1977). Part C of PTE 76-1 provides conditional exemptive relief from the prohibited transaction provisions of sections 406(a) and 407(a) of the Act for the leasing of office space by a multiple employer plan to a participating employee organization, participating employer, or another multiemployer plan. PTE 77-10, which complements PTE 76-1, provides conditional exemptive relief from the prohibited transaction provisions of section 406(b)(2) of the Act with respect to the leasing of office space by a multiple employer plan to a participating employee organization, participating employer, or another multiemployer plan. The Applicant represents that the 1336 Building Lease meets all of the required conditions under PTEs 76-1 and 77-10. The Department, however, expresses no opinion herein on whether the requirements of PTEs 76-1 and 77-10 have been met by the Applicant.

4. **Property-Related Expenses.** In connection with its ownership of the Properties, the Plan currently generates approximately \$65,784 in rental income on an annual basis from the 1336 Building Lease. This income, however, is offset by recurring expenses on the Properties, which include real estate taxes, general maintenance costs, and utility costs. For the Plan year

ending May 31, 2015, the Plan incurred expenses totaling \$34,389.24 in connection with its ownership of the Properties. These incurred expenses included \$13,780.75 in real estate taxes, \$11,112.00 in insurance costs, and \$9,505.49 in utility and maintenance costs.

5. **Attempt to Sell the 1330-1332 Building.** In August 2012, the Trustees agreed to pursue a sale of the 1330-1332 Building to an unrelated buyer. At the time, the Trustees had determined that the 1330-1332 Building had become a non-performing asset for the Plan. On August 1, 2012, the Trustees entered into an Exclusive Sale and Lease Agreement (the Sale and Lease Agreement) with Jameson Real Estate, LLC (Jameson), of Chicago, Illinois, an unrelated party with respect to the Plan. Pursuant to the Sale and Lease Agreement, the Trustees granted to Jameson the exclusive right to either: (a) sell the 1330-1332 Building for an amount within the range of \$75.00-\$95.00 per square foot; or (b) lease the 1330-1332 Building to an unrelated party for a monthly amount within the range of \$8.50-\$10.00 per square foot. The Plan received no offers in connection with its efforts to sell or rent the 1330-1332 Building.

6. **Union's Offer to Purchase the Properties.** During the Trustees' March 14, 2013 meeting, Union Trustee, Ken Turnquist, informed the Trustees that the Union was interested in purchasing both of the Properties from the Plan, and that he was in the



early stages of putting together a Letter of Intent to do so. The Union subsequently assessed an inspection report (the Inspection Report), which revealed that the Properties were in need of certain remedial masonry and environmental work. Specifically, the Inspection Report concluded that the 1336 Building required complete tuck-pointing of its North and West facing elevations and a rebuild of the six inch exterior veneer of its chimneys (the Masonry Repairs). Additionally, the Inspection Report concluded that environmental considerations warranted the removal of an obsolete underground oil tank from beneath the 1330-1332 Building (the Environmental Repairs).

Following receipt of the Inspection Report, the Union solicited and received multiple bids to complete the above-cited masonry and environmental repairs. With regard to the Masonry Repairs, the Union received a low bid of \$174,421.00 (the Masonry Bid) from Grove Masonry Maintenance, Inc. of Alsip, Illinois, an unrelated party with respect to the Plan. With regard to the Environmental Repairs, the Union received a low bid of \$39,500.00 (the Water Tank Removal Bid) from WM. J. Scown Building Company of Wheeling, Illinois, also an unrelated party with respect to the Plan.

7. During the Trustees' March 6, 2014 meeting, Mr. Turnquist presented the Trustees with three documents: (a) an offer from the

Union to purchase the Properties for \$1,416,000.00 (the March 2014 Offer); (b) an appraisal report completed by Charles G. Argianas and Robert S. Huth of the Industrial Appraisal Company, of Pittsburgh, Pennsylvania (the Independent Appraiser), valuing the Properties at \$1,630,000.00 as of January 23, 2014 (the January 2014 Appraisal Report); and (c) the above-noted Masonry and Water Tank Removal Bids. Following recusal by the Union Trustees, the Employer Trustees proceeded to review and discuss the March 2014 Offer.

The Employer Trustees determined that it was in the best interest of the Plan and its participants and beneficiaries to sell the Properties at their fair market value. In this regard, the Employer Trustees determined that the Plan would not assume the Remediation Costs as an offset to the purchase price. On September 15, 2015, the Employer Trustees communicated to the Union that the Plan was seeking full fair market value of \$1,640,000.00 for the Properties with no offset. The Union thereafter accepted the Employer Trustees' amended offer.

8. **Relevant Terms of the Sale.** As stated in the Purchase Agreement, the Union will deposit \$50,000 into an escrow account held for the benefit of the Plan with an unrelated escrow agent. The remaining balance of \$1,590,000 will be paid by the Union to the Plan at closing by cash, certified or cashier's check, or wire

transfer. As also stated in the Purchase Agreement, the Plan will pay no real estate fees or commissions, or incur any other expenses or costs as a result of the Sale. In this regard, the Union will assume all closing costs associated with the Sale, including the city, county, and state transfer taxes that are associated with the transaction. Finally, the Plan will pay no fees to the Independent Appraiser in connection with the Sale.

9. **Legal Analysis.** The Applicant has requested an administrative exemption from the Department because the proposed Sale violates several provisions of the Act. Section 406(a)(1)(A) of the Act provides that a fiduciary with respect to a plan shall not cause a plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between a plan and a party in interest. Further, section 406(a)(1)(D) of the Act provides that a fiduciary with respect to a plan shall not cause a plan to engage in a transaction if the fiduciary knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

Section 3(14)(D) of the Act defines the term "party in interest" to include an employee organization any of whose members are covered by such plan. Section 3(14)(A) of the Act defines the

term "party in interest" to include any fiduciary of such plan. Thus, the Union, as an employee organization whose members are covered by the Plan, and the Trustees, as fiduciaries to the Plan, are parties in interest with respect to the Plan, pursuant to sections 3(14)(A) and 3(14)(D) of the Act, respectively. Accordingly, the Sale would constitute a violation of section 406(a)(1)(A) and (D) of the Act.

10. **The Qualified Independent Appraiser.** On November 2, 2012, Terry Musto, Fund Administrator to the Plan, engaged the Industrial Appraisal Company to render an opinion as to the fair market value of the Properties. As represented by the Applicant, Mr. Musto is neither a Union official nor a Union member. The Applicant further represents that Mr. Musto has been delegated the power and authority to engage service providers on behalf of the Plan.

As mentioned above, Charles C. Argianas and Robert S. Huth of the Industrial Appraisal Company completed the January 2014 Appraisal Report. Subsequently, on January 9, 2015, Mr. Argianas and Maksym Smolyak completed an updated appraisal report of the Properties, as of December 22, 2014 (the January 2015 Appraisal Report).<sup>6</sup>

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<sup>6</sup> The January 2014 and the January 2015 Appraisal Reports are together referred to herein as the "Appraisal Reports."

Mr. Argianas is a Certified General Real Estate Appraiser in the State of Illinois (License # 553.000164). He is also a member of the Appraisal Institute. Mr. Smolyak is an Associate Real Estate Trainee Appraiser, and has performed and assisted in real estate consulting and appraisal assignments involving various properties throughout Illinois, Indiana, and Wisconsin.

Messrs. Argianas and Smolyak have certified that they have "no present or prospective interest in the [P]roperty that is the subject of this report and no personal interest with respect to the parties involved," and that the fees derived from parties in interest are equal to less than 1/10<sup>th</sup> of 1% of Industrial Appraisal Company's revenues for 2014, from all sources, and that the Industrial Appraisal Company has never been engaged by the Union, or any other party in interest to the Plan. Messrs. Argianas and Smolyak have also acknowledged that they are aware that the Appraisal Reports are being used for the purposes of obtaining an individual exemption from the Department.

As represented in the Appraisal Reports, Messrs. Argianas and Smolyak performed the following underlying tasks to determine the Properties' value: (a) an analysis of regional, city, market area, site, and improvement data; (b) an inspection of the Properties and the immediate market area; and (c) a review of data regarding real estate taxes, zoning, and utilities.

In valuing the Properties, Messrs. Argianas and Smolyak considered all of the commonly-accepted approaches to property valuation, including the Cost Approach, Income Capitalization Approach and Sales Comparison Approach. After considering each of the three approaches separately, they determined that the Sales Comparison Approach warranted primary consideration in establishing market value for the Properties. Messrs. Argianas and Smolyak state that the Sales Comparison Approach is most reliable when there are a sufficient number of veritable sales and offerings that are representative of a subject property. In such a case, they explain, fewer adjustments increase the reliability of the ultimate valuation. With respect to the other valuation approaches, Messrs. Argianas and Smolyak accorded "due consideration" to the Income Capitalization Approach, and "little consideration" to the Cost Approach.

After inspecting the Properties and analyzing all relevant data, Messrs. Argianas and Smolyak determined the "AS-IS" Fee Simple Market Value of the Properties to be \$1,430,000, as of December 22, 2014 in the January 2015 Appraisal Report. To arrive at their valuation conclusion for the Properties, Messrs. Argianas and Smolyak first assigned a full fair market value of \$1,640,000 to the Properties' land, structure, and improvements. They then deducted \$210,000 from that amount to account for the Remediation

Costs.

The Employer Trustees and the Union have agreed to the purchase price of \$1,640,000, which represents the full fair market value of the Properties with no offsets for the Remediation Costs or other costs. As a specific condition of this proposed exemption, the Independent Appraiser will reassess the fair market value of the Properties on the Sale date in an updated appraisal (the Updated Appraisal). With respect to the Updated Appraisal, the Employer Trustees will ensure that the Independent Appraiser's valuation methodology is properly applied in determining the fair market value of the Properties.

11. **Statutory Findings.** The Applicant represents that the proposed exemption is administratively feasible because it involves a one-time sale of the Properties for cash. As such, the proposed exemption will not require ongoing oversight by the Department. In addition, the Applicant represents that the proposed exemption is in the interest of the Plan and its participants and beneficiaries because the Sale will facilitate a more productive investment vehicle for the Plan. In this regard, the Applicant estimates that the proceeds from the Sale will generate annual income in excess of \$100,000 for the Plan, going forward.

In addition, the Applicant represents that anticipated income to the Plan following the Sale will significantly exceed the

income which the Plan would realize through a continued ownership of the Properties. The Applicant points out that the Plan currently generates approximately \$65,000 in rental income on an annual basis as the owner of the Properties. This income, however, is offset by recurring expenses, which include real estate taxes, general upkeep and maintenance costs, and utility costs. The Applicant represents that an offset of these costs leaves the Plan with approximately \$11,000 in annual net income as owner of the Properties.

13. **Summary.** In summary, it is represented that the proposed transaction satisfies or will satisfy the statutory criteria for an exemption under section 408(a) of the Act because:

(a) The Sale will be a one-time transaction for cash.

(b) The price paid by the Union to the Plan will be equal to the greater of: (1) \$1,640,000, or (2) the fair market value of the Properties, as determined by the Independent Appraiser as of the date of the Sale;

(c) The Plan will not pay any appraisal fees, real estate fees, commissions, costs or other expenses in connection with the Sale;

(d) The Union Trustees will recuse themselves from: (1) discussions and voting with respect to the Plan's decision to enter into the Sale; and (2) all aspects of the selection and



engagement of the Independent Appraiser for the purposes of determining the fair market value of the Properties on the date of the Sale;

(e) The Employer Trustees, who have no interest in the Sale:

- (1) will determine, among other things, whether it is in the best interest of the Plan to proceed with the Sale of the Properties;
- (2) will review and approve the methodology used by the Independent Appraiser in the Appraisal Report that is being relied upon; and
- (3) will ensure that such methodology is applied by the Independent Appraiser in determining the fair market value of the Properties on the date of the Sale; and

(f) The Sale will not be part of an agreement, arrangement, or understanding designed to benefit the Union.

#### NOTICE TO INTERESTED PERSONS

The persons who may be interested in the publication in the Federal Register of the Notice of Proposed Exemption (the Notice) include all individuals who are participants in the Plan. It is represented that such interested persons will be notified of the publication of the Notice by first class mail to such interested person's last known address within fifteen (15) days of publication of the Notice in the Federal Register. Such mailing will contain a copy of the Notice, as it appears in the

Federal Register on the date of publication, plus a copy of the Supplemental Statement, as required, pursuant to 29 CFR 2570.43(b)(2), which will advise all interested persons of their right to comment on and/or to request a hearing. All written comments or hearing requests must be received by the Department from interested persons within 45 days of the publication of this proposed exemption in the Federal Register.

All comments will be made available to the public. **Warning:** Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Mr. Joseph Brennan of the Department at (202) 693-8456. (This is not a toll-free number.)

**Liberty Media 401(k) Savings Plan (the Plan)**

**Located in Englewood, CO**

**[Application No. D-11858]**

PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA or the Act) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code) and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).<sup>7</sup>

Section I. Covered Transactions

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act shall not apply to: (1) the acquisition by the Plan of certain stock subscription rights (the Rights) to purchase shares of Liberty Broadband Series C common stock (LB Series C Stock), in connection with a rights offering (the Rights Offering) held by Liberty Broadband Corporation (Liberty Broadband), a party in interest with respect to the Plan; and (2) the holding of the

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<sup>7</sup> For purposes of this proposed exemption, references to the provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

Rights by the Plan during the subscription period of the Rights Offering, provided that the conditions described in Section II below have been met.

## Section II. Conditions for Relief

(a) The Plan's acquisition of the Rights resulted solely from an independent corporate act of Liberty Broadband;

(b) All holders of Liberty Broadband Series A common stock and Liberty Broadband Series C common stock (collectively, the LB Stock), including the Plan, were issued the same proportionate number of Rights based on the number of shares of LB Stock held by each such shareholder;

(c) For purposes of the Rights Offering, all holders of LB Stock, including the Plan, were treated in a like manner;

(d) The acquisition of the Rights by the Plan was made in a manner that was consistent with provisions of the Plan for the individually-directed investment of participant accounts;

(e) The Liberty Media 401(k) Savings Plan Administrative Committee (the Committee) directed the Plan trustee to sell the Rights on the NASDAQ Global Select Market, in accordance with Plan provisions that precluded the Plan from acquiring additional shares of LB Stock;

(f) The Committee did not exercise any discretion with

respect to the acquisition and holding of the Rights; and

(g) The Plan did not pay any fees or commissions in connection with the acquisition or holding of the Rights, and did not pay any commissions to Liberty Broadband, Liberty Media Corporation, TruePosition, Inc., or any affiliates of the foregoing in connection with the sale of the Rights.

EFFECTIVE DATE: The proposed exemption, if granted, will be effective from December 15, 2014, the date that the Plan received the Rights, until December 17, 2014, the date the Rights were sold by the Plan on the NASDAQ Global Select Market.

## SUMMARY OF FACTS AND REPRESENTATIONS<sup>8</sup>

### *Background*

1. Liberty Media Corporation (Liberty Media) is a Delaware corporation with its principal place of business in Englewood, Colorado. Liberty Media is a publicly traded corporation primarily engaged in media, communications and entertainment operating businesses through several subsidiaries, including Liberty Broadband Corporation (Liberty Broadband). Liberty

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<sup>8</sup> The Summary of Facts and Representations is based on Liberty Media's representations and does not reflect the views of the Department, unless indicated otherwise.

Broadband holds ownership interests in Charter Communications, Inc. (Charter Communications), TruePosition, Inc. (TruePosition), and a minority equity investment in Time Warner Cable, among other debt and equity assets.

2. Liberty Media sponsors and maintains the Liberty Media 401(k) Savings Plan (the Plan). The assets of the Plan are held in the Liberty Media 401(k) Savings Plan Trust (the Trust). The Plan and Trust were created for the exclusive benefit of employee-participants and their beneficiaries. Liberty Media represents that the Plan is intended to qualify under sections 401(a) and 401(k) of the Code, and the Trust is intended to be exempt under Section 501(a) of the Code.

The Plan allows participants to direct the investment of their entire Plan accounts into any of 22 investment alternatives, including certain employer securities issued by Liberty Media such as Liberty Media's Series A and Series C common stock, as well as employer securities issued by other participating employers in the Plan. The Liberty Media 401(k) Savings Plan Administrative Committee (the Committee) is appointed by the board of directors of Liberty Media and has investment discretion over the Plan's investments, except to the extent that the participants can direct the investment of their Plan accounts. The trustee of the Plan (the Trustee) is Fidelity

Management Trust Company (Fidelity). The Trustee acts as custodian of Plan assets, holding legal title to Plan assets, and executing investment directions in accordance with the participants' written instructions.

#### *The Spin-Off of Liberty Broadband*

3. On November 4, 2014, Liberty Media engaged in a spin-off (the Spin-Off) of its subsidiary, Liberty Broadband. Liberty Media notes that, at the time of the Spin-Off, Liberty Broadband owned a 100% ownership interest in TruePosition, and certain other equity and debt interests.

4. According to Liberty Media, for every share of Liberty Media's Series A common stock held by a shareholder, including the Plan, as of 5:00 p.m., New York City time, on October 29, 2014, the shareholder received one quarter (1/4) of a share of Liberty Broadband's Series A common stock (LB Series A Stock), with cash issued in lieu of fractional shares. Furthermore, for every share of Liberty Media's Series C common stock held by a shareholder, including the Plan, as of 5:00 p.m., New York City time, on October 29, 2014, the shareholder received one quarter (1/4) of a share of Liberty Broadband's Series C common stock (LB Series C Stock), with cash issued in lieu of fractional shares. Liberty Media explains that the shares of LB Series A Stock and

LB Series C Stock (collectively, the LB Stock) were distributed as of 5:00 p.m., New York City time, on November 4, 2014 (the Spin-Off Date). Liberty Media notes that Liberty Broadband continued to own its interests in TruePosition, among its other interests, following the Spin-Off Date.

5. According to Liberty Media, the LB Stock received by the Plan as a result of the Spin-Off was allocated to the Plan participants' accounts in the same proportion as the shares were distributed in the Spin-Off. However, Liberty Media explains that, effective as of the Spin-Off Date, both the Plan and Trust were amended so as to preclude additional investments in LB Stock. As such, Liberty Media explains, the Plan was frozen to additional investments in LB Stock as of the Spin-Off Date. Plan participants holding the LB Stock received in the Spin-Off in their accounts could then elect to sell or transfer out the LB Stock held in their Plan accounts at any time.

6. Liberty Media explains that TruePosition, a participating employer with respect to the Plan prior to the Spin-Off, had considered establishing a new 401(k) plan for its employees that would be available for those employees immediately upon the Spin-Off. However, it was unable to do so within the ten-day timeframe prior to the Spin-Off Date. At the same time, TruePosition did not want its employees to be without a 401(k)



plan to contribute to during this period. As such, Liberty Media allowed TruePosition to continue to participate in the Plan for the remainder of 2014. Liberty Media represents that TruePosition employees no longer participate in the Plan.

### *The Rights Offering*

7. Liberty Media represents that, on December 10, 2014, Liberty Broadband initiated a rights offering (the Rights Offering) and issued subscription rights (individually, a Right, and collectively, the Rights) to purchase shares of LB Series C Stock to holders of the LB Stock, including the Plan, as of 5:00 p.m., New York City time, on December 4, 2014 (the Record Date).

In a Form S-1 filed with the SEC on October 16, 2014, Liberty Broadband stated that it conducted the Rights Offering to raise capital for general corporate purposes. According to Liberty Media, under the terms of the Rights Offering, one Right was issued for every five shares of LB Stock held by the shareholder, including the Plan. Once received, each Right gave the respective shareholder the right to purchase one share of LB Series C Stock at a 20% discount to the 20-trading day volume weighted average price of the LB Series C Stock following the Spin-Off Date.

According to Liberty Media, the Rights could be exercised or

sold during the period of the Rights Offering, which ran from December 11, 2014 through January 9, 2015. Liberty Media notes that the Rights began trading on the Nasdaq Global Select Market (the NASDAQ) on a when-issued basis on December 10, 2014, and began fully trading on December 11, 2014, under the symbol "LBRKR." During the Rights Offering period, the Rights traded at an average daily volume of 254,232 Rights/day and at a total cumulative trading volume of 5,338,866 Rights.

According to Liberty Media, the Plan held 287,143.473 shares of LB Stock as of the Record Date. As such, Liberty Media states that the Plan received 57,428.641 Rights in connection with the Rights Offering.

8. Liberty Media represents that, because of the restrictions placed on the Plan's ability to invest in LB Stock described above, Plan participants could not exercise Rights for their Plan accounts. Liberty Media states that, because the exercise of the Rights received in the Rights Offering was not permitted, the Committee directed the Trustee to sell the Rights received by the Plan, in accordance with its instructions.

9. According to Liberty Media, the Trustee received the Rights on behalf of the Plan on December 15, 2014. Liberty Media represents that the Plan established a separate temporary investment fund to receive and hold the Rights (the Rights Fund)

pending the disposition of the Rights by the Trustee. Liberty Media notes that the Trustee acted as custodian of the Rights held in the Rights Fund. Liberty Media explains that the Rights were credited to participants' Plan accounts based on their respective holdings of LB Stock.

10. Liberty Media represents that the Trustee sold the Plan's Rights on the NASDAQ at market value on December 17, 2014, and the settlement from the sale of such Rights was completed by December 22, 2014. Liberty Media explains that, during the period that the Rights were traded on the NASDAQ from December 10, 2014 through January 9, 2015), the Rights sold for prices between \$6.64 and \$11.82 per Right. Liberty Media represents that the Plan received an average price of \$7.6323 per Right for the sale of the Rights on the NASDAQ, for a total of \$438,312.65.

11. According to Liberty Media, the Committee did not exercise any discretion with respect to the acquisition and holding of the Rights, because the Rights were unilaterally issued by Liberty Broadband to all holders of the LB Stock, including the Plan, without any action on the part of any stockholder. Liberty Media explains that, because the exercise of the Rights to purchase additional LB Series C Stock was not permitted, due to the fact that new investments in the Shares were not permitted under the Plan, the Committee directed the

Trustee to sell the Rights.

12. Liberty Media represents that the Plan did not pay any fees or commissions in connection with the acquisition and holding of the Rights. Liberty Media notes that the Plan paid a commission rate of 2.9 cents per Right to Fidelity Brokerage Services LLC (Fidelity Brokerage), an affiliate of Fidelity, the Trustee, in connection with the sale of the Rights.<sup>9</sup> Liberty Media explains that the commissions were paid out of the Plan's forfeiture accounts.

*Exemptive Relief Requested*

13. Liberty Media represents that the acquisition and holding by the Plan of the Rights constitute prohibited transactions in violation of sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act. Section 406(a)(1)(E) of the Act

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<sup>9</sup> Liberty Media explains that the parties are relying on the exemptive relief provided by section 408(b)(2) of the Act, relating to the provision by a party-in-interest to the Plan, and the payment therefor, of services necessary for the administration of the Plan, if no more than reasonable compensation is paid for such service. Liberty Media represents that the Plan Committee determined that Fidelity Brokerage was an appropriate provider of brokerage services in connection with the sale of the Rights on the NASDAQ and that the fees charged by Fidelity Brokerage for those services was reasonable. The Department is expressing no opinion herein as to whether the provision of services by Fidelity Brokerage to the Plan and the payment of commissions by the Plan to Fidelity Brokerage satisfy the requirements of section 408(b)(2) of the Act.

provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction if he or she knows or should know that such transaction constitutes the acquisition, on behalf of the plan, of any employer security in violation of section 407(a) of the Act. Section 406(a)(2) of the Act provides that a fiduciary of a plan shall not permit the plan to hold any employer security if he or she knows or should know that holding such security violates section 407(a) of the Act. Under section 407(a)(1)(A) of the Act, a plan may not acquire or hold any "employer security" which is not a "qualifying employer security." Under section 407(d)(1) of the Act, "employer securities" are defined, in relevant part, as securities issued by an employer of employees covered by the plan, or by an affiliate of such employer. Section 407(d)(5) of the Act provides, in relevant part, that "qualifying employer securities" are stock or marketable debt obligations.

Liberty Media states that the Rights constitute "employer securities" under section 407(d)(1) of the Act because the employees of TruePosition, an affiliate of Liberty Broadband, participated in the Plan at the time of the Rights Offering. Therefore, because the Rights were issued by an affiliate of TruePosition, which was an employer of employees covered by the Plan at the time of the Rights Offering, the Rights constituted

employer securities. Liberty Media states further that, since the Rights did not constitute stock or marketable debt securities, they were not qualifying employer securities. Therefore, Liberty Media requests a retroactive exemption from sections 406(a)(1)(E), 406(a)(2), and 407(a)(1)(A) of the Act for the acquisition and holding of the Rights in connection with the Rights Offering.

14. As explained above, Liberty Media represents that the acquisition of the Rights has been completed. Liberty Media represents that no Plan accounts currently hold any Rights. Liberty Media notes that the Rights were sold by the Plan on the NASDAQ and that no Rights were exercised while in the Plan accounts. Liberty Media seeks retroactive relief effective from December 15, 2014, the date that the Plan received the Rights, until December 17, 2014, the date the Rights were sold on the NASDAQ.

#### *Statutory Findings*

15. Liberty Media represents that the proposed exemption is administratively feasible. Liberty Media represents that all shareholders, including the Plan, were treated in a like manner with respect to the acquisition and holding of the Rights. Furthermore, Liberty Media notes that the Rights were distributed

to all shareholders of LB Stock, and upon receipt of the Rights by the Plan, they were placed in the Rights Fund. Thereafter, because the Plan was not permitted to acquire additional LB Stock, the Committee directed the Trustee to sell all of the Rights on the NASDAQ in accordance with their instructions. As such, Liberty Media represents that there is no reason for any continuing Departmental oversight.

16. Liberty Media represents that an exemption for the Plan's acquisition and holding of the Rights through its participation in the Rights Offering is in the interests of the Plan and its participants and beneficiaries because it allowed participants and beneficiaries to benefit from the sale of the Rights at no cost to the Plan, with the exception of a commission paid in connection with the sale of the Rights.

In this regard, the Rights were credited to participants' Plan accounts based on their respective holdings of Shares, and the proportionate cash proceeds from the sale of the Rights were placed in each respective account.

17. Liberty Media represents that an exemption for the acquisition and holding of the Rights in the Rights Offering is protective of the rights of participants and beneficiaries because the Rights were sold on the NASDAQ by the Trustee for their market value, in arms'-length transactions between

unrelated parties. Furthermore, Liberty Media represents that the Plan did not pay any fees or commissions with respect to the acquisition or holding of the Rights, and it did not pay any commissions to any affiliate of Liberty Broadband, Liberty Media, or TruePosition with respect to the sale of the Rights.

*Summary*

18. In summary, Liberty Media represents that the proposed exemption satisfies the statutory criteria for an exemption under section 408(a) of the Act for the reasons stated above and for the following reasons:

a. The Plan's acquisition of the Rights resulted solely from an independent corporate act of Liberty Broadband;

b. All holders of LB Stock, including the Plan, were issued the same proportionate number of Rights based on the number of shares of LB Stock held by each such shareholder;

c. For purposes of the Rights Offering, all holders of LB stock, including the Plan, were treated in a like manner;

d. The acquisition of the Rights by the Plan was made in a manner that was consistent with provisions of the Plan for the individually-directed investment of participant accounts;

e. The Committee directed the Plan trustee to sell the Rights on the NASDAQ, in accordance with Plan provisions that



precluded the Plan from acquiring additional shares of LB Stock;

f. The Committee did not exercise any discretion with respect to the acquisition and holding of the Rights; and

g. The Plan did not pay any fees or commissions in connection with the acquisition or holding of the Rights, and did not pay any commissions to Liberty Broadband, Liberty Media, TruePosition, or any affiliates of the foregoing in connection with the sale of the Rights.

#### NOTICE TO INTERESTED PERSONS

Notice of the proposed exemption will be given to all Interested Persons within 7 days of the publication of the notice of proposed exemption in the Federal Register, by first class U.S. mail to the last known address of all such individuals. Such notice will contain a copy of the notice of proposed exemption, as published in the Federal Register, and a supplemental statement, as required pursuant to 29 CFR 2570.43(a)(2). The supplemental statement will inform interested persons of their right to comment on the pending exemption. Written comments are due within 37 days of the publication of the notice of proposed exemption in the Federal Register.

All comments will be made available to the public.

**WARNING:** If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Scott Ness of the Department, telephone (202) 693-8561. (This is not a toll-free number.)

**Baxter International Inc. (Baxter or the Applicant)**

**Located in Deerfield, IL**

**[Application No. D-11866]**

#### PROPOSED EXEMPTION

The Department is considering granting an exemption under the authority of section 408(a) of the Employee Retirement Income Security Act of 1974, as amended, (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR Part 2570, Subpart B (76 FR 66637, 66644, October 27, 2011).

#### Section I. Transaction

If the proposed exemption is granted, the restrictions of sections 406(a)(1)(A) and (D) and sections 406(b)(1) and (2) of ERISA and sections 4975(c)(1)(A), (D), and (E) of the Code shall not apply to the contribution of publicly traded common stock of Baxalta (the Contributed Stock) by Baxter (the Contribution) to the Baxter International Inc. and Subsidiaries Pension Plan (the Plan), provided:

(a) Fiduciary Counselors Inc. (the Independent Fiduciary) will represent the interests of the Plan, the participants, and beneficiaries with respect to the Contribution, including but not

limited to, taking the following actions:

(i) Determining whether the Contribution is in the interests of the Plan and of its participants and beneficiaries, and is protective of the rights of participants and beneficiaries of the Plan;

(ii) Determining whether and on what terms the Contribution should be accepted by the Plan;

(iii) If the Contribution is accepted by the Plan, establishing and administering the process (subject to such modifications as the Independent Fiduciary may make from time to time) for liquidating the Contributed Stock, as is prudent under the circumstances;

(iv) Determining the fair market value of the Contributed Stock as of the date of the Contribution;

(v) Monitoring the Contribution and holding of Contributed Stock on a continuing basis and taking all appropriate actions necessary to safeguard the interests of the Plan; and

(vi) If the Contribution is accepted by the Plan, voting proxies and responding to tender offers with respect to the Contributed Stock held by the Plan;

(b) Solely for purposes of determining the Plan's minimum funding requirements (as determined under section 412 of the

Code), adjusted funding target attainment percentage (AFTAP) (as determined under Treas. Reg. section 1.436-1(j)(1)), and funding target attainment percentage (as determined under section 430(d)(2) of the Code), the Plan's actuary (the Actuary) will not count as a contribution to the Plan any shares of Contributed Stock that have not been liquidated;

(c) For purposes of determining the amount of any Contribution, the Contributed Stock shall be deemed contributed only at the time it is sold, equal to the lesser of: (1) the proceeds from the sale of such Contributed Stock; or (2) the value of such Contributed Stock on the date of the initial contribution as determined by the Independent Fiduciary;

(d) The Contributed Stock represents no more than 20% of the fair market value of the total assets of the Plan at the time it is contributed to the Plan;

(e) The Plan pays no commissions, costs, or other expenses in connection with the Contribution, holding, or subsequent sale of the Contributed Stock, and any such expenses paid by Baxter will not be treated as a contribution to the Plan;

(f) Baxter makes cash contributions to the Plan to the extent that the cumulative proceeds from the sale of the Contributed Stock at each contribution due date (determined under section 303(j) of ERISA) are less than the cumulative cash

contributions Baxter would have been required to make to the Plan, in the absence of the Contribution. Such cash contributions shall be made until all of the Contributed Stock is sold by the Plan; and

(g) Baxter contributes to the Plan cash amounts needed for the Plan to attain an AFTAP (determined under Treas. Reg. section 1.436-1(j)(1)) of at least 80% as of the first day of each plan year during which the Plan holds Contributed Stock, as determined by the Actuary, without taking into account any unsold Contributed Stock as of April 1 of the plan year.

## SUMMARY OF FACTS AND REPRESENTATIONS<sup>10</sup>

### *Background*

1. Baxter International, Inc. (Baxter or the Applicant) is a Delaware corporation headquartered in Deerfield, Illinois, and does business throughout the world. Baxter was originally founded in 1931 as a manufacturer of intravenous (IV) solutions. Baxter's shares are publicly traded on the New York Stock Exchange (the NYSE). Prior to the spin-off transaction described below, Baxter had approximately 60,000 employees worldwide and

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<sup>10</sup> The Summary of Facts and Representations is based on the Applicant's representations and does not reflect the views of the Department, unless indicated otherwise.

two principal lines of business with manufacturing and research facilities in the United States, Belgium, Czech Republic, France, Germany, Ireland, Italy, Malta, Poland, Spain, Sweden, Switzerland, and the United Kingdom. The first business line involved the manufacture and sale of medical devices, primarily products used in the delivery of fluids and drugs to patients (the Medical Products Business). The second business line involved the manufacture and sale of products derived from blood plasma and other natural substances and used to treat bleeding disorders, immune deficiencies, and other conditions (the BioScience Business). In 2014, Baxter had net income of approximately \$2.5 billion on net sales of approximately \$16.7 billion, and as of December 31, 2014, its total shareholder's equity was in excess of \$8.1 billion. Additionally, its debt is rated "investment grade" by the Standard & Poor's, Moody's, and Fitch rating services.

2. Baxalta Incorporated (Baxalta) is a Delaware corporation that was incorporated on September 8, 2014, as a wholly-owned subsidiary of Baxter. Baxter transferred the BioScience Business to Baxalta as part of the spin-off described below. For 2014, Baxalta's net sales were approximately \$6.109 billion, and its net operating income was approximately \$1.114 billion. As of March 31, 2015, Baxalta had total assets of approximately \$11

billion. Baxalta has approximately 16,000 employees worldwide, with plants located in six countries.

3. The Plan is a defined benefit pension plan qualified under section 401(a) of the United States Internal Revenue Code of 1986, as amended (the Code) and sponsored and maintained by Baxter for the benefit of its employees located within the United States. As of May 1, 2015, there were a total of 30,836 participants and beneficiaries in the Plan. Baxter froze the Plan to new participants on December 31, 2006, and no person hired or re-hired, or transferred to a Baxter company in the United States after such date is eligible to participate in the Plan. Persons who were participants in the Plan on December 31, 2006, continue to accrue benefits under the Plan, except that Baxter gave participants who had fewer than five years of vesting service on December 31, 2006, an election between: (1) continuing to accrue benefits under the Plan; or (2) receiving enhanced contributions to Baxter's defined contribution plan (i.e., its 401(k) plan).

4. The Plan is funded by the Baxter International Inc. and Subsidiaries Pension Trust (the Trust), which was established pursuant to a trust agreement originally entered into July 1, 1986. The Plan's assets are invested under the direction of independent investment advisers, who are selected and overseen by



Baxter's Investment Committee. As of June 30, 2015, the Plan had approximately \$3.0 billion in total assets.<sup>11</sup>

5. Baxter's Administrative Committee is a committee comprised of employees of Baxter, which is appointed by the Compensation Committee of Baxter's Board of Directors. The Administrative Committee is responsible for the administration of Baxter's employee benefit plans, including the Plan, and is the designated "plan administrator" of the Plan for purposes of ERISA. The Investment Committee is also a committee comprised of employees of Baxter, but is appointed by Baxter's Board of Directors. The Investment Committee is responsible for directing the investment of the Plan's assets, including the selection and oversight of all investment managers and advisers for the Plan. The members of both the Administrative Committee and Investment Committee (together, the Committees) are named fiduciaries for purposes of ERISA with respect to the Plan. Both committees approved the proposed transaction of Contributed Stock and retention of Fiduciary Counselors, Inc. to act as the independent fiduciary for the Plan (the Independent Fiduciary).

6. The Plan's independent actuary, Towers Watson (the

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<sup>11</sup> The number of participants and beneficiaries and the total Plan assets noted in this proposal represent totals after giving effect to the spin-off described below.

Actuary), determined that the Plan's adjusted funding target attainment percentage (AFTAP) as of January 1, 2014, was 104.3%, and the AFTAP as of January 1, 2015, was 107.16%. Baxter elected to apply its credit balance under the Plan to satisfy its minimum funding obligation for the 2014 plan year and was not required to make any cash contribution for that year. Baxter's minimum contribution obligation for 2015 was reduced to zero by the application of funding balances from prior years, and accordingly Baxter was not obligated to make (and did not make) any 2015 contribution. Under current projections, and excluding the proposed Contribution, Baxter states that it will not be required to make any cash contributions to the Plan until the 2019 plan year.

#### *The Spin-Off*

7. Baxter distributed approximately 80.5 percent of the common stock of Baxalta (the Baxalta Stock) to the shareholders of Baxter as a stock dividend (the Spin-Off) on July 1, 2015 (the Spin-Off Date). Each shareholder of Baxter received one share of Baxalta Stock for each share of Baxter stock owned on the record date for the Spin-Off. Furthermore, pursuant to a Separation and Distribution Agreement, dated June 30, 2015, between Baxter and Baxalta, Baxter transferred to Baxalta all of the assets that

made up the BioScience Business, and Baxalta assumed the liabilities relating to the BioScience Business.

8. In connection with the Spin-Off, effective May 1, 2015, Baxalta established the Baxalata Incorporated and Subsidiaries Pension Plan (the Baxalta Plan), and the accrued benefits of all active participants in the Plan whose employment was transferred to Baxalta pursuant to the spin-off were transferred to the Baxalta Plan. The benefits of all terminated and retired participants were retained by the Plan, regardless of whether the participant was employed in the Medical Products Business or the BioScience Business.

9. In connection with the Spin-Off, but prior to the Spin-Off Date, Baxter caused a registration of the Baxalta Stock to be filed with the Securities and Exchange Commission, and caused the Baxalta Stock to be listed on the NYSE, so that immediately following the Spin-Off, Baxalta became a publicly traded stock, freely tradable on the NYSE. Baxter received a private letter ruling (the Private Letter Ruling) from the Internal Revenue Service covering certain federal income tax consequences of the Spin-Off. According to the Applicant, the Private Letter Ruling provides that Baxter's use of the Baxalta Stock retained by Baxter (the Retained Stock) to satisfy such debts and obligations, including the proposed contribution of a portion of

the Retained Stock to the Plan, will not result in the recognition by Baxter of taxable income, provided that the Retained Stock is used for such purpose within eighteen months following the Spin-Off Date.

### *The Contribution*

10. Baxter states that the total value of all outstanding shares of Baxalta Stock (including the Retained Stock) as of July 2015 was approximately \$20.3 billion, and the total value of the Retained Stock was approximately \$4.0 billion, based upon a value of \$30 per share. On the Spin-Off Date, the Retained Stock constituted approximately 19.5 percent of the total shares of Baxalta Stock. Baxter proposes to make an in-kind contribution (i.e., a contribution other than cash) to the Plan of a portion of the Retained Stock (the Contributed Stock). Baxter represents that the Contributed Stock will have a market value, after any applicable liquidity discount, of not more than \$750 million. The Applicant states further that based upon an assumed value of \$30 per share, the number of shares of Contributed Stock will not be more than 25 million, which would represent approximately 18.95 percent of the Retained Stock and 4.4 percent of the total number of outstanding shares of Baxalta Stock (including the shares originally distributed as part of the Spin-Off and the

Contributed Stock, but not the remaining shares of Retained Stock). The Applicant notes that, however, in no event will the value of the Contributed Stock exceed 20 percent of the total value of the Plan's assets immediately after Baxter contributes the Contributed Shares (the Contribution).

11. The Applicant represents that the Private Letter Ruling from the IRS specifically sanctions the contribution of the Contributed Stock on a tax-free basis, as long as the Contribution is completed within 18 months after the Spin-Off Date. As a result of the Private Letter Ruling, Baxter would save approximately \$260 million in taxes if the Contributed Stock is contributed to the Plan. Baxter intends to pass this tax savings to the Plan in order to fund future benefits. Thus, Baxter states that an exemption for the in-kind contribution of the Contributed Stock will increase the assets available to the Plan by approximately \$262.5 million.

12. Baxter states that the Baxalta Stock is listed on the NYSE, so that the Plan will be able to sell shares in open market transactions on the NYSE. Furthermore, according to Baxter, the shares of Contributed Stock will be considered "restricted shares" so that they can only be sold by the Plan in accordance

with Rule 144 of the Securities and Exchange Commission.<sup>12</sup>

However Baxter states that Rule 144's limitation on the maximum number of shares that may be sold by an affiliate within any three month period will not apply to the Plan. The Rule 144 requirement that the Plan hold the Contributed Stock for at least six months will apply, but Baxter expects to be able to consider its own holding time of the shares towards the Plan's six-month period, which was satisfied as of November 10, 2015. The Plan, however, would not be able to sell all of the Contributed Stock at one time without potentially depressing the market. Accordingly, the Independent Fiduciary has been tasked with selling the Contributed Stock on behalf of the Plan as quickly as is prudent and consistent with applicable laws.

*Reasons the Proposed Transaction is Prohibited under ERISA and the Code*

13. Baxter represents that it is the employer - or the ultimate shareholder of the employer - of all of the employees covered by the Plan, and therefore a "party in interest" with respect to the Plan as defined in section 3(14)(C) and (E) of

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<sup>12</sup> See 17 C.F.R. §230.144.

ERISA.<sup>13</sup> Section 406(a)(1)(A) of ERISA provides that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect sale or exchange, or leasing, of any property between the plan and a party in interest. The Applicant notes that in *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 US 152 (1993), the United States Supreme Court held that a contribution of property to a plan, in satisfaction of the employer's minimum funding obligation, was a "sale or exchange" for purposes of section 406(a)(1)(A) of ERISA. The Applicant also notes that in *Interpretive Bulletin 94-3(b)*, 29 C.F.R. 2509.94-3(b), the Department concluded that any contribution of property to a defined benefit pension plan is a sale or exchange for purposes of section 406(a)(1)(A) of ERISA, even if the contribution is not used to satisfy a minimum funding obligation. Thus, the Applicant states that the Contribution will constitute a sale or exchange of the Contributed Stock between the Plan and a party in interest, and is prohibited under section 406(a)(1)(A) of ERISA.

14. In addition, section 406(a)(1)(D) of ERISA provides

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**13** For purposes of this proposed exemption, references to Title I of ERISA, unless otherwise specified, refer also to the corresponding provisions of the Code.

that a fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect transfer to, or use by or for the benefit of a party in interest, of any assets of the plan. The Applicant states that the use of the Contributed Stock to potentially reduce Baxter's funding obligation could be considered a use of the Contributed Stock after it has become a plan asset for Baxter's benefit.

15. Section 406(b)(1) of ERISA provides that a fiduciary with respect to a plan shall not deal with the assets of the plan in his own interest or for his own account, and section 406(b)(2) of ERISA provides that a fiduciary with respect to a plan shall not in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries. By causing the Plan to receive the Contribution, the members of the Committees and Baxter could be viewed as either dealing with the Plan's assets in their own interest or for their own account in violation of section 406(b)(1) of ERISA or as acting on behalf of Baxter in the Contribution, where Baxter's interests are adverse to those of the Plan, in violation of section 406(b)(2) of ERISA.



### *Independent Fiduciary*

16. As described in more detail below, the Committees have retained Fiduciary Counselors Inc., the Independent Fiduciary, to represent the interests of the Plan with respect to the proposed transaction pursuant to an agreement dated May 11, 2015 (and which was subsequently updated on January 22, 2016). The Independent Fiduciary is an investment adviser registered under the Investment Advisers Act of 1940 that primarily acts as an independent fiduciary for employee benefit plans. Furthermore, Fiduciary Counselors states that it has served as an independent fiduciary for employee benefit plans since 2001. Fiduciary Counselors represents that they are highly qualified to serve as independent fiduciary in connection with the proposed transactions. The Independent Fiduciary was selected by the Committees based upon proposals submitted by the Independent Fiduciary and other candidates.

17. The Independent Fiduciary states that it is not related to or affiliated with any of the other parties to the transaction, and has not previously been retained to perform services with respect to the Plan or any other employee benefit plan sponsored by Baxter. Fiduciary Counselors represents and warrants that it is independent of and unrelated to Baxter and Baxalta, and that: (a) it does not directly or indirectly

control, is not controlled by, and is not under common control with Baxter or Baxalta; (b) neither it, nor any of its officers, directors, or employees is an officer, director, partner, or employee of Baxter or Baxalta (or is a relative of such persons); (c) it does not directly or indirectly receive any consideration for its own account in connection with the Contribution or its services described hereunder, except that it may receive compensation from Baxter for performing the services described in this proposed exemption as long as the amount of such payment is not contingent upon or in any way affected by Fiduciary Counselor's ultimate decision; and (d) the percentage of Fiduciary Counselor's revenue that is derived from the Plan, any party in interest, or its affiliates involved in the proposed transactions is less than 5% of its previous year's annual revenue from all sources. Fiduciary Counselors represents that it understands and acknowledges its duties and responsibilities under ERISA in acting as an independent fiduciary on behalf of the Plan in connection with the covered transactions.

18. Fiduciary Counselors provided a preliminary report dated July 22, 2015 (the IF Report), that analyzed the proposed Contribution and described its responsibilities in connection therewith. In connection with the IF Report, the Independent Fiduciary considered the following key elements:

(a) Whether the Plan's Investment Policy would permit the Plan to hold the Contributed Stock as an acceptable investment. According to the IF Report, the Investment Committee approved the acceptance of the Contributed Stock as an employer contribution in the Plan, to be subsequently liquidated for cash. Therefore, the Independent Fiduciary determined that the Contributed Stock is an acceptable investment for the Plan and would be liquidated as soon as practicable and consistent with ERISA.

(b) Whether any liquidity discount would be applicable to the valuation of the Contributed Stock. The Independent Fiduciary retained Murray, Devine & Co., Inc. (Murray Devine) as an independent valuation adviser in order to assist with this determination.<sup>14</sup> The IF Report provides that the Contributed

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**14** According to Fiduciary Counselors, Murray Devine is well qualified for this engagement in that it is a nationally recognized valuation advisory firm and has provided valuation advisory services to private equity, corporate, venture capital, and commercial banking institutions since its inception in 1989. Fiduciary Counselors represents that it has utilized their services in other engagements. Furthermore, Murray Devine represents and warrants that it is independent of and unrelated to Baxter, Baxalta, and Fiduciary Counselors, and that:

- It does not directly or indirectly control, is not controlled by, and is not under common control with Baxter, Baxalta, or Fiduciary Counselors;
- Murray Devine, nor any of its officers, directors, or employees is an officer, director, partner or employee of Baxter, Baxalta or Fiduciary Counselors (or is a relative of such persons);

Stock could be liquidated in as few as 42 trading days, depending on the particular circumstances, assuming (i) Baxter contributes 25 million shares of Baxalta stock to the Plan, (ii) the Contributed Stock trading volumes remain around 6 million shares per day, and (iii) Fiduciary Counselors limits the disposition of Contributed Stock to 10% or less of daily volume (provided that such limitation is appropriate and consistent with ERISA). Therefore, Fiduciary Counselors expects the liquidity discount computed by Murray Devine will be very small.

(c) What impact, if any, the Contribution will have on the diversification of the Plan's portfolio. The IF Report provides that, while the Plan's acceptance of the Contributed Stock will skew the Plan's asset class allocations above the targeted amount for Large Cap stock of 24% of plan assets, this will be a temporary deviation and Fiduciary Counselors expects the allocation will return to pre-Contribution levels as the Contributed Stock is sold. Thus, the Independent Fiduciary does not believe that the Contribution will cause any significant disruption to the Plan's asset allocation.

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- The amount of compensation received by Murray Devine is not contingent of the valuation; and

The percentage of Murray Devine's revenue that is derived from any party in interest or its affiliates involved in the stock

(d) Whether the Plan will have sufficient liquidity to meet benefits payments. The IF Report indicates that, as of June 30, 2015, the Plan held approximately \$120 million of its assets in cash or cash equivalents. According to the IF Report, since the Plan does not currently have a minimum funding obligation, its assets will increase by investment income, which is currently estimated to yield a 7.25% annual rate of return or approximately \$218 million. Further, the largest Plan outflow is benefit payments of \$160 million a year. Because the majority of the Plan's assets are in investments that can be liquidated on a daily basis, and the Contributed Stock will be converted to cash as it is liquidated, the IF Report concludes that the Plan will have sufficient liquidity to meet its needs over the time period while the Contributed Stock is held by the Plan.

(e) Whether the Contribution will sufficiently improve the Plan's funded status. According to the IF Report, the Contribution will increase the funded status of the plan by between \$600 million and \$750 million, thereby significantly improving the funded status of the Plan.<sup>15</sup> The IF Report also

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contribution is less than 5% of its previous year's annual revenue from all sources.

<sup>15</sup> For purposes of the IF Report, Fiduciary Counselors estimated a range for the value of the Contribution that takes into account the requirement that, for purposes of determining minimum

notes that the Actuary estimated no minimum funding requirement for the 2016, 2017, and 2018 plan years, indicating that the Plan will continue to be well-funded.

(f) The ability of the Contributed Stock to be readily liquidated given its publicly traded nature. The IF Report notes that the Contributed Stock is publicly traded, can be partially sold daily at market prices, and can be completely liquidated in as few as 42 trading days (nine weeks) at current trading volume without depressing the stock price,<sup>16</sup> the Contributed Stock can be readily converted into cash and is considered a highly liquid investment.

19. The IF Report also describes the Independent Fiduciary's other responsibilities in connection with the Contribution. In this regard, the Independent Fiduciary will monitor the covered transactions on a continuing basis and take all appropriate actions to safeguard the interests of the Plan to

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funding, the amount of the Contribution will be deemed to be the lesser of the proceeds from the sale of the Contributed Stock or the value of the Contributed Stock at the time it is contributed to the Plan.

**16** The IF Report indicates that Baxalta anticipates receiving an opinion from its securities counsel that the Plan will not be considered an "affiliate" of Baxalta within the meaning of Rule 144. Accordingly, the limitation on the maximum number of shares that may be sold by an affiliate within any three month period (the Volume Limitation) will not apply to the sales of Contributed Stock by the Plan.

ensure that the transactions remain in the interests of the Plan, and, if not, take appropriate action available under the circumstances. Additionally, the Independent Fiduciary will determine whether and on what terms the Contribution should be accepted by the Plan, and if the Contribution is accepted by the Plan, vote proxies and respond to tender offers with respect to the Contributed Stock held by the Plan.

20. After Baxter makes the Contribution, the Independent Fiduciary will act as an investment manager to establish and administer the process (subject to such modifications as the Independent Fiduciary may make from time to time) for liquidation of the Contributed Stock as quickly as is prudent and consistent with market conditions and applicable laws. If, following the acceptance of the Contributed Stock and in the course of liquidating such stock, the Independent Fiduciary determines that continuing the liquidation of the Contributed Stock is imprudent, and is likely to remain imprudent for an indefinite period of time, the Independent Fiduciary shall notify the Committees, who shall arrange for the remaining Contributed Stock to be transferred to the portfolio of one or more of the Plan's independent investment managers, and the agreement with the Independent Fiduciary shall terminate.

*Statutory Findings - Administratively Feasible*

21. The Applicant represents that a proposed exemption is administratively feasible because the Independent Fiduciary, rather than the Department, will monitor the covered transactions for compliance with the terms of the proposed exemption and enforce the rights of the Plan in connection with the covered transactions. Furthermore, Baxter's proposed Contribution will be a single event, and the Contributed Stock will be sold by the Plan over a relatively short time period. Baxter states further that since Baxalta Stock is publicly traded and readily saleable, the sales will occur through open market transactions on a nationally recognized exchange, obviating the need for further monitoring.

*Statutory Findings - In the Interest of the Plan and its Participants and Beneficiaries*

22. The Applicant states that a proposed exemption is in the interest of the Plan and its participants and beneficiaries. According to Baxter, the Contributed Stock will increase the assets of the Plan by as much as 20 percent, which will significantly improve the funded status of the Plan. Since the Contributed Stock will only be counted towards Baxter's minimum funding requirement as the shares are sold by the Plan and



converted into more diversified investments, Baxter will still be obligated to make its minimum required contributions as if the Contributed Stock had never been received until and unless the shares are sold. Thus, the Applicant states that the Plan gets the benefit of the additional value of the Contributed Stock without giving up the benefit of minimum required cash contributions from Baxter.

*Statutory Findings - Protective of the Rights of the Plan and its Participants and Beneficiaries*

23. The Applicant states that the requested exemption is protective of the rights of the Plan and its participants and beneficiaries. The Applicant reiterates that the principal protection for participants and beneficiaries is the fact that the Independent Fiduciary, acting solely in the interest of the participants and beneficiaries, will review the transaction to ensure that it is fair to the participants and beneficiaries, will monitor compliance with the exemption, and will oversee the Plan's sale of the Contributed Stock.

24. Additionally, the requested exemption would require Baxter to make cash contributions to the Plan to the extent that the cumulative proceeds from the sale of the Contributed Stock at each contribution due date (determined under section 303(j) of

ERISA) are less than the cumulative cash contributions Baxter would have been required to make to the Plan in the absence of the Contribution. Such cash contributions must be made until all of the shares of Contributed Stock are sold. These conditions should mitigate the risk of the Plan holding too much of its assets in one security. Solely for purposes of determining the Plan's minimum funding requirements, AFTAP, and funding target attainment percentage, the Actuary will not count as a contribution to the Plan any Contributed Stock that has not been sold. The Applicant states that this protection is intended to ensure that Baxter does not receive a credit for minimum funding purposes under section 302 of ERISA for the Contributed Stock prior to the time the stock is sold, when it could still decrease in value. If the Independent Fiduciary determines that the Plan should retain shares of the Contributed Stock on an indefinite basis, such a decision will be communicated to the Committees.

25. The Applicant also states that Baxter must contribute to the Plan such cash amounts as are needed for the Plan to maintain an AFTAP of at least 80 percent as of the first day of each plan year during which the Plan holds shares of the Contributed Stock, as determined by the Actuary, without taking into account any Contributed Stock that has not been sold by April 1 of the plan year.

26. The Applicant also states that the value of the Contributed Stock cannot be more than 20 percent of the fair market value of the total assets of the Plan at the time Baxter makes the Contribution to the Plan. Additionally, the Plan may not pay any commissions, costs, or other expenses in connection with the contribution, holding, or subsequent sale of the Contributed Stock, and any such expenses paid by Baxter must not be treated as a contribution to the Plan.

*Summary*

27. In summary, the Applicant represents that the proposed Contribution will meet the criteria of section 408(a) of ERISA and section 4975(c)(2) of the Code for the above and the following reasons:

(a) The Independent Fiduciary will represent the interests of the Plan, the participants, and beneficiaries with respect to the Contribution;

(b) Solely for purposes of determining the Plan's minimum funding requirements, AFTAP, and funding target attainment percentage, the Actuary will not count as a contribution to the Plan any shares of Contributed Stock that have not been liquidated;

(c) For purposes of determining the amount of any

Contribution, the Contributed Stock shall be deemed contributed only at the time it is sold, equal to the lesser of: (1) the proceeds from the sale of such Contributed Stock; or (2) the value of such Contributed Stock on the date of the initial contribution as determined by the Independent Fiduciary;

(d) The Contributed Stock represents no more than 20% of the fair market value of the total assets of the Plan at the time it is contributed to the Plan;

(e) The Plan pays no commissions, costs, or other expenses in connection with the Contribution, holding, or subsequent sale of the Contributed Stock, and any such expenses paid by Baxter will not be treated as a contribution to the Plan;

(f) Baxter makes cash contributions to the Plan to the extent that the cumulative proceeds from the sale of the Contributed Stock at each contribution due date are less than the cumulative cash contributions Baxter would have been required to make to the Plan, in the absence of the Contribution. Such cash contributions shall be made until all of the Contributed Stock is sold by the Plan; and

(g) Baxter contributes to the Plan cash amounts needed for the Plan to attain an AFTAP of at least 80% as of the first day of each plan year during which the Plan holds Contributed Stock, as determined by the Actuary, without taking into account any

unsold Contributed Stock as of April 1 of the plan year.

#### NOTICE TO INTERESTED PERSONS

Baxter will provide notice of the proposed exemption to all persons with accrued benefits under the Plan, all beneficiaries of deceased participants, and all alternate payees pursuant to qualified domestic relations orders within five (5) calendar days of publication of the proposed exemption in the Federal Register. For all persons for whom disclosure by electronic media is permitted by 29 CFR § 2520.104b-1(c), notice will be posted on Baxter's internal website and such persons will be notified of the posting by e-mail in accordance with 29 CFR § 2520.104b-1(c). Baxter will provide the notice to all other interested persons via first-class mail. In addition to the proposed exemption, as published in the Federal Register, Baxter will provide interested persons with a supplemental statement, as required, under 29 CFR § 2570.43(a)(2). The supplemental statement will inform such employees of their right to comment on and to request a hearing with respect to this proposed exemption. The Department must receive all written comments and/or requests for a hearing within 35 days of the publication of this proposed exemption in the Federal Register. The Department will make all comments available to the public.

**WARNING:** If you submit a comment, EBSA recommends that you include your name and other contact information in the body of your comment, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Mr. Erin S. Hesse of the Department, telephone (202) 693-8546 (This is not a toll-free number.)

#### **GENERAL INFORMATION**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to

discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that

each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 25th day of April, 2016.

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Lyssa E. Hall, Director  
Office of Exemption  
Determinations  
Employee Benefits Security  
Administration  
U.S. Department Of Labor

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